

Spring 1983

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### Recommended Citation

Andrew Von Hirsch, Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale, 74 J. Crim. L. & Criminology 209 (1983)

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# COMMENSURABILITY AND CRIME PREVENTION: EVALUATING FORMAL SENTENCING STRUCTURES AND THEIR RATIONALE\*

ANDREW VON HIRSCH\*\*

## I. INTRODUCTION

It scarcely is news that a number of American jurisdictions<sup>1</sup> have moved, or are moving, toward adoption of formal sentencing structures—by which I mean laws, rules, or guidelines that provide explicit and detailed guidance on how severely convicted offenders should be (or should ordinarily be) punished.<sup>2</sup> Researchers have begun to evaluate

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\* The research on which this Article is based was supported by the Project on Strategies for Determinate Sentencing, funded by grants (nos. 78-NI-AX-0081/2) from the National Institute of Justice of the U.S. Department of Justice. Points of view stated in this Article are those of the author and do not necessarily represent the official position or policies of the funding agency.

I am indebted to my colleagues Martin Forst, Kathleen Hanrahan, Sheldon Messinger, John Monahan, Julia Mueller, and Richard Sparks for their helpful comments on drafts of this Article.

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<sup>1</sup> Two states (Minnesota and Pennsylvania) have sentencing guidelines established by a sentencing commission, and a third (Washington) is now in the process of writing such guidelines. A number of other states (Alaska, Arizona, California, Colorado, Illinois, Indiana, New Jersey, New Mexico, and North Carolina) have detailed, legislatively-prescribed sentencing standards. Still other jurisdictions (the federal system, Oregon, Florida, New York, Oklahoma, and Georgia) have parole release guidelines prescribing specific terms or ranges of terms of confinement before release on parole. For a summary and analysis of these systems, see von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289 (1981) [hereinafter cited as von Hirsch & Hanrahan, *Determinate Penalty Systems*].

<sup>2</sup> A "determinate" penalty system is one which (1) has rules providing detailed guidance on the quantum of punishment, and (2) has procedures designed to notify imprisoned offenders early of their expected dates of release. *Id.* at 294-96. By a "formal sentencing structure" I mean any system having the first feature—whether or not it has the second feature of an early time-fix. This includes (1) legislatively-prescribed determinate sentencing systems, (2) court-prescribed sentencing guidelines, (3) sentencing guidelines written by specialized rulemakers such as sentencing commissions, and (4) guidelines on duration of confinement written by parole boards. The definition covers both systems which prescribe a range as the normally recommended sanction and those which set forth a fixed point as the recommended disposition. Such schemes might either have been written from a historical perspective to reflect

these efforts.<sup>3</sup>

The problem with conducting these evaluations is that a multiplicity of possible sentencing rationales are involved: deterrence, incapacitation, rehabilitation, or desert. The degree of a system's "success" may thus vary according to which of these conceptions, or which combination of these conceptions, is used as the basis of the judgment. Not all of these conceptions, moreover, are aimed at crime-control so as to permit traditional evaluations of the system's effectiveness in preventing criminal behavior. Desert, especially, is addressed to ethical issues concerning the justice of the sentencing rules. By what standards, then, should evaluation proceed?

This Article addresses this question. I shall, first, suggest some general principles for evaluating a formal sentencing structure in desert terms. Next, I suggest how such a structure's rationale can be identified; that is, what specific features distinguish desert-oriented features of guidelines from those emphasizing more utilitarian goals (particularly, incapacitation). In describing these principles of evaluation, the focus will be on the task of a "jurisprudential" evaluator who examines a formal sentencing structure as it is written.<sup>4</sup> I shall, however, touch upon issues which more empirically-concerned investigators might consider in examining the impact that such sentencing structures have on the quanta and distribution of punishments actually inflicted.

Following this outline, Parts II-IV of the Article will sketch the main desert requirements, describe the still-to-be resolved problems of a desert rationale, and suggest how a system might be assessed in desert terms. The two parts thereafter, V and VI, examine the structural differences in a sentencing scheme that indicate whether it emphasizes desert or incapacitation.

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existing sentencing practice, or have been developed prescriptively to reflect aims of the rulemakers' own choosing. All these systems provide a systematic body of norms for determining the quantum of punishment to be imposed on convicted persons. *Id.* All might be evaluated in the manner suggested in this Article.

<sup>3</sup> See, e.g., MINN. SENTENCING GUIDELINES COMM'N, PRELIMINARY REPORT ON THE DEVELOPMENT AND IMPACT OF THE MINNESOTA SENTENCING GUIDELINES (1982); Brewer, Beckett & Holt, *Determinate Sentencing in California: The First Year's Experience*, 18 J. RESEARCH CRIME & DELINQ. 200 (1981).

<sup>4</sup> I have attempted two such analyses of particular jurisdictions. One, dealing with Minnesota's sentencing guidelines, is von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission*, 5 HAMLINE L. REV. 164 (1982) [hereinafter cited as von Hirsch, *Constructing Guidelines for Sentencing*]. The other, examining California's Determinate Sentencing Law, is A. von Hirsch & J. Mueller, *California's Determinate Sentence Law: An Analysis of Its Structure* (Dec. 1972) (unpublished manuscript).

## II. THE REQUIREMENTS OF DESERT

## A. THE COMMENSURATE-DESERTS PRINCIPLE AND ITS RATIONALE

The fundamental principle of desert in punishing convicted persons is that the severity of the punishment should be commensurate with the seriousness of the offender's criminal conduct.<sup>5</sup> The focus of the commensurate-deserts principle is on the gravity of *past* conduct, not on the likelihood of future behavior; this retrospective orientation distinguishes desert from the crime-control goals of deterrence, incapacitation, and rehabilitation. The criterion for judging whether a penalty is deserved is whether it fairly reflects the gravity of the criminal conduct of which the defendant has been convicted, rather than its effectiveness in preventing future crimes by the defendant or other potential offenders.

The rationale of the principle may be stated as follows. Punishment involves blame; it is a defining characteristic of punishment that is not merely unpleasant (so are many other kinds of state intervention) but also characterizes the person punished as a wrongdoer who is being censured or reproved for his or her criminal act. The severity of the punishment connotes the amount of blame: the sterner the punishment, the greater the implicit censure. The amount of punishment therefore ought to comport, as a matter of justice, with the degree of blameworthiness of the offender's criminal conduct.<sup>6</sup>

The principle of commensurate-deserts addresses the question of *allocation* of punishments—that is, how much to punish convicted offenders. This allocation question is distinct from the issue of the *general justification* of punishment—namely, why the legal institution of punishment should exist at all. In arguing that the commensurate-deserts principle is a requirement of justice, one need not adopt the view that reprobation of wrongdoing is the only reason for the existence of the criminal sanction. It may exist to discourage crime as well as to censure as deserved.<sup>7</sup> But punishment, once established for whatever reason, necessarily implies blame. It therefore ought in fairness to be distributed among convicted offenders in a manner that is consistent with the amount of implicit blame.<sup>8</sup>

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<sup>5</sup> A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 66-76 (1976) [hereinafter cited as *DOING JUSTICE*]. For a summary of the desert model and the other sentencing theories influential today, see von Hirsch, *Recent Trends in American Sentencing Theory*, 42 MARYLAND L. REV. 6 (1983).

<sup>6</sup> *DOING JUSTICE*, *supra* note 5, at 71-74.

<sup>7</sup> *Id.* at 45-55. For my current views, see von Hirsch, "Neoclassicism," *Proportionality and the Rationale for Punishment: Thoughts on the Scandinavian Debate*, 29 CRIME & DELINQ. (1983) (forthcoming) [hereinafter cited as von Hirsch, "Neoclassicism"].

<sup>8</sup> *DOING JUSTICE*, *supra* note 5, at 45-55.

B. THE THREE REQUIREMENTS OF COMMENSURABILITY: PARITY, ORDINAL PROPORTIONALITY, AND CARDINAL PROPORTIONALITY

The principle of commensurate-deserts involves three requirements that may be separated for purposes of analysis. The first of these is parity, in the desert sense:<sup>9</sup> defendants whose criminal conduct is equally blameworthy should be punished with equal severity. The second is ordinal proportionality: the ranking and spacing of penalties relative to each other should reflect the comparative gravity of the criminal conduct involved. The third is cardinal proportionality: at all points on the penalty scale, there should be a reasonable proportion maintained between the quantum of punishment and the gravity of the conduct.

1. *Desert-parity*

The principle of commensurate-deserts permits differences in severity of punishment among offenders only to the extent these differences reflect variations in the blame justly due them. When offenders have been convicted of crimes of equal seriousness, they therefore deserve punishments of the same severity—unless one can identify special factors (i.e., aggravating and mitigating circumstances) that render the offense, in the particular context in which it occurred, more or less deserving of blame than would normally be the case.<sup>10</sup>

Some writers, such as Norval Morris,<sup>11</sup> have argued against the parity requirement. They contend that desert should be considered only for setting broad upper and lower bounds on the severity of penalties, and that within these bounds the sentence should be determined on util-

<sup>9</sup> Any theory of justice calls for equal treatment of equals. The question is the criterion of equality: equal in what respect? On a desert theory, the criterion is the blameworthiness of the offender's criminal conduct: those whose conduct is equally blameworthy ought to be punished equally.

<sup>10</sup> In *DOING JUSTICE*, *supra* note 5, at 72-74, the argument for the parity requirement is spelled out as follows:

Concededly, it is easier to discern gross excess in lenience or severity than to decide on a specific proportion between a crime and its punishment. But, . . . the [commensurate-deserts] principle is infringed when disparate penalties are imposed on equally deserving offenders. If A and B commit a burglary under circumstances suggesting similar culpability, they deserve similar punishments; imposing unequal sanctions on them for utilitarian ends—even within some outer bounds of proportionality . . .—still unjustly treats one as though he were more to blame than the other. . . .

Equity is sacrificed when the principle [of parity] is disregarded, even when done for the sake of crime prevention. Suppose there are two kinds of offenses, A and B, that are of approximately equal seriousness; but that offense B can more effectively be deterred through the use of a severe penalty. Notwithstanding the deterrent utility of punishing offense B more severely, the objection remains that the perpetrators of that offense are being treated as though they are more blameworthy than the perpetrators of offense A—and that is not so if the crimes are of equivalent gravity.

<sup>11</sup> Morris, *Punishment, Desert, and Rehabilitation*, in *SENTENCING* 257-71 (H. Gross & A. von Hirsch eds. 1981).

itarian grounds.<sup>12</sup> The problem with relegating desert to an outer limit in this fashion<sup>13</sup> is explaining how there justly can be even modest differences in the severity of blame-ascribing sanctions among those whose conduct is assumed to be equally blameworthy. To justify the unequal punishment of the equally deserving, Morris is forced to argue that equality is not one of the important requirements of justice.<sup>14</sup>

For present purposes, suffice it to say that the parity requirement is one of the distinguishing features of a desert-oriented rationale<sup>15</sup>—one that marks it off from competing conceptions such as Morris' more utilitarian view.<sup>16</sup> Parity is thus an important dimension to look for when evaluating formal sentencing structures from a desert perspective.

## 2. Ordinal Proportionality

Ordinal proportionality is the requirement that the ranking of severity of penalties should reflect the seriousness-ranking of the criminal conduct. Punishments are to be ordered on the scale so that their relative severity corresponds to the comparative blameworthiness of the conduct. This requirement restricts the extent to which the arrangement of penalties on the scale may be varied internally for utilitarian purposes.<sup>17</sup> Imposing exemplary penalties for burglaries to bring a halt to a recent wave of those crimes, for example, will throw the ranking of offenses out of kilter unless other penalties are adjusted accordingly.

Ordinal proportionality involves a further requirement of spacing. The size of the increment from one penalty to another should reflect, in relation to the dimensions of the whole scale, the size in the step-up in seriousness from one species of criminal conduct to another.<sup>18</sup> The ranking and spacing of penalties is thus a second major dimension for evaluating penalty systems from a desert perspective.

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<sup>12</sup> This is also the view taken in ABA TASK FORCE ON SENTENCING ALTERNATIVES & PROCEDURES, SENTENCING ALTERNATIVES AND PROCEDURES (1979). See also M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE 89-101, 105-06 (1981); Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L. REV. 976 (1978).

<sup>13</sup> My objections to Morris' view of desert as an outer limit are elaborated in von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 RUTGERS L. REV. 772 (1981) [hereinafter cited as von Hirsch, *Utilitarian Sentencing*]; see also von Hirsch, Book Review, 131 U. PA. L. REV. (1983) (forthcoming).

<sup>14</sup> Morris, *supra* note 11, at 267. My reply to Morris' claims about equality is set forth in von Hirsch, *Utilitarian Sentencing*, *supra* note 13, at 783-89.

<sup>15</sup> See, e.g., DOING JUSTICE, *supra* note 5, at 66-76; J. KLEINIG, PUNISHMENT AND DESERT (1973); R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979). For further bibliography, see SENTENCING, *supra* note 11, at 189.

<sup>16</sup> For further discussion of Morris' position, see *infra* notes 63 and 87.

<sup>17</sup> A. VON HIRSCH & K. HANRAHAN, THE QUESTION OF PAROLE: RETENTION, REFORM OR ABOLITION? 17-18 (1979); DOING JUSTICE, *supra* note 5, at 90-91.

<sup>18</sup> DOING JUSTICE, *supra* note 5, at 91.

### 3. Cardinal Proportionality

Cardinal proportionality is the requirement that a reasonable proportion be maintained between the absolute levels of punishment and the seriousness of the criminal conduct.<sup>19</sup> It refers not to the internal architecture of the scale, but to its anchoring points and overall magnitude. Even where penalties on the scale have been ranked in the order of the crimes' seriousness, the scale may infringe cardinal proportionality if its overall severity levels have been sufficiently inflated or deflated. The complexities of these issues are discussed below.

## III. PARTIALLY UNRESOLVED ISSUES IN DESERT THEORY

Assessing a penalty system from a desert perspective thus involves asking whether the system satisfies the foregoing requirements of parity, ordinal proportionality, and cardinal proportionality. The assessment is complicated, however, by the presence of several partially unresolved issues in desert theory. Let us turn next to these issues, and see what is and is not understood about them.

### A. CRITERIA FOR SERIOUSNESS

Analytically, the seriousness of criminal conduct has two major components: harm and culpability.<sup>20</sup> Harm refers to the degree of injury done or risked by the act. Culpability refers to the factors of intent, motive, and circumstance that bear on the actor's blameworthiness—for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor's criminal conduct was provoked by the victim's own misconduct.<sup>21</sup>

Marvin Wolfgang has argued that the criteria for seriousness should be developed using empirical studies of popular perceptions of the gravity of offenses.<sup>22</sup> Beginning with Wolfgang's and Thorsten Sellin's work in 1964, several surveys have measured the public's perceptions of seriousness of offenses and found that people from different walks of life give similar ratings to the gravity of common acts of fraud,

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<sup>19</sup> *Id.* at 91-94.

<sup>20</sup> *Id.* at 79-83. For a discussion of the relative weight given harm as opposed to risk of harm, see Schulhofer, *Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

<sup>21</sup> Culpability, in turn, affects the assessment of harm. An individual should thus be held responsible only for the foreseeable consequences of his *own* acts. Unforeseeable consequences, or the harm wrought by others who choose to commit similar criminal acts, should not be included in the assessment of harm. DOING JUSTICE, *supra* note 5, at 80-81.

<sup>22</sup> Wolfgang, *Seriousness of Crime and a Policy of Juvenile Justice*, in DELINQUENCY, CRIME, AND SOCIETY 267-86 (J. Short ed. 1976).

theft and violence.<sup>23</sup> If this approach to rating seriousness were taken, therefore, considerable data would be available for the task.

It can be argued, however, that this approach is conceptually flawed. Harm in criminal conduct, Richard Sparks has suggested,<sup>24</sup> depends not on what people think are the consequences and risks of criminal conduct, but on the actual consequences and risks. To the extent the public either overestimates or underestimates the injury done or risked by various criminal acts, surveys of popular perceptions will fail to provide a sound basis for rating the gravity of crimes.

Sparks has proposed that seriousness-ratings should rely instead on empirical studies of the type and degree of injury (or risk of injury) typically associated with various types of crime.<sup>25</sup> Traditional victimization studies have been more concerned with the incidence of criminal acts than with the type and extent of typical consequences.<sup>26</sup> While such studies provide some data about the shorter-term consequences of being victimized (e.g., the type and extent of property loss, personal injury, and loss of earnings), a more systematic analysis of short *and* longer term consequences is needed.

Such an empirical inquiry into criminal harm must be supplemented by value judgments. Different crimes may injure different interests: one crime primarily affects property, another privacy, another personal safety. It will therefore be necessary to decide on the priority that should be assigned those various interests, and more thought is needed on how these priorities could be established. One way might be to give priority to those interests which *must* be protected in order for the individual to be able to exercise other choices.<sup>27</sup> There remains also the other element in seriousness: the offender's culpability for the acts he commits—in regard to which moral judgments are unavoidable. All these value dimensions in the rating of seriousness have yet to be examined in systematic fashion.

While these issues are being explored, however, the seriousness of crimes can be graded in approximate fashion through the exercise of common sense. At least as far as typical crimes of theft, force, and fraud

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<sup>23</sup> T. SELLIN & M. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964). For more recent studies, see R. SPARKS, H. GENN & D. DODD, *SURVEYING VICTIMS: A STUDY OF THE MEASUREMENT OF CRIMINAL VICTIMIZATION* ch. 7 (1977); Turner, *Introduction to Reprint Edition*, in T. SELLIN & M. WOLFGANG, *supra*, at v-xxi (reprint ed. 1978).

<sup>24</sup> Sparks developed this view in an unpublished presentation to the Conference on Penal Desert held at Sterling Forest Conference Center, Tuxedo, N.Y., on November 19-21, 1978.

<sup>25</sup> *Id.*

<sup>26</sup> For a useful summary and analysis of recent victimization studies, see Sparks, *Surveys of Victimization — An Optimistic Assessment*, in 3 *CRIME AND JUSTICE* 1-60 (M. Tonry & N. Morris eds. 1981).

<sup>27</sup> See, e.g., Kleinig, *Crime and the Concept of Harm*, 15 *AM. PHIL. Q.* 27 (1978).



are concerned, one can develop some rough idea of their likely consequences by using the statutory description of the crime coupled with available common knowledge about such crimes. One can also make common-sense moral judgments about the importance of the rights and interests invaded by different species of crime. One can grade culpability at least according to whether intentional or negligent conduct is involved. Thus, in assessing a formal sentencing structure, the appropriate question to ask is: to what extent has there been a conscientious effort to make such common-sense judgments about the gravity of offenses? To determine whether there has been such an effort, several matters should be considered.

1. Has the system explicitly rated the seriousness of crimes? Several determinate-penalty systems have adopted numerical seriousness-grades. Minnesota, for example, has rated offenses on a ten-point seriousness scale.<sup>28</sup> Other systems have no such rankings. California simply assigns a presumptive penalty to each of the various statutory crimes, without any explicit grading of the seriousness of crimes.<sup>29</sup> An explicit seriousness rating helps the rulemaker, as well as the evaluators, to check whether a system is meeting parity and ordinal proportionality requirements.

2. In grading offenses, has the rulemaking agency made its own conscientious judgment on the merits as to their seriousness? Or has the grading system merely been borrowed from somewhere else? Some jurisdictions adopted the pre-existing statutory gradations of maximum penalties as the offense rankings for the new sentencing guidelines or rules.<sup>30</sup> The trouble with this approach is that those statutory gradations were designed for a wholly different purpose.<sup>31</sup> Several jurisdictions—Minnesota and Oregon, for example—have adopted seriousness gradations designed for the special purpose of their formal sentencing rules. The rulemaker (the sentencing commission in Minnesota, an advisory commission together with the parole board in Oregon) adopted its grading

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<sup>28</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 196.

<sup>29</sup> CAL. [PENAL] CODE § 1170(a)(2) (West Supp. 1982).

<sup>30</sup> This is true, for example, of Indiana's and Illinois' determinate sentencing codes. Indiana bases its presumptive sentences on the felony classification of offenses. For a discussion of this and other problems of the Indiana statute, see Clear, Hewitt & Regoli, *Discretion and the Determinate Sentence: Its Distribution, Control, and Effect on Time Served*, 24 CRIME & DELINQ. 428 (1978); von Hirsch, *The New Indiana Sentencing Code: Is it Indeterminate Sentencing?*, in ANATOMY OF CRIMINAL JUSTICE: A SYSTEMS OVERVIEW 143-56 (C. Foust & D. Webster eds. 1980) [hereinafter cited as von Hirsch, *The New Indiana Sentencing Code*].

<sup>31</sup> In a formal sentencing structure, the seriousness-ratings are used to help determine the recommended penalty or range of penalties; and that recommended disposition is meant to be the disposition for the normal or typical case for that offense. The traditional statutory maximum, on the other hand, is not concerned with the typical case, but instead deals with the highest permissible penalty for the *worst* case.

system after debating the seriousness of the various crimes at considerable length.<sup>32</sup>

3. Has the rulemaker given explicit reasons for its seriousness ratings? The rating choice becomes more rational when the rater tries to identify what he or she believes to be the interests threatened by various crimes and tries to assess and explain which interests are to be regarded as the more important. Generally, this has not been attempted in systematic fashion in the formal sentencing rules established to date.<sup>33</sup>

#### B. CRITERIA FOR JUDGING PUNISHMENTS' SEVERITY

In order to link the seriousness of offenses to the severities of punishment, one needs criteria for judging how severe or lenient various punishments are. Leslie Sebba<sup>34</sup> has attempted to develop a scale of severity by a technique similar to that used by Sellin and Wolfgang for seriousness, namely, to survey popular perceptions of the severity of different kinds of punishments. This research revealed considerably less consensus than the Sellin-Wolfgang seriousness research has shown. Moreover, there are conceptual difficulties in relying upon such research. If those surveyed have not experienced the punishment and believe themselves unlikely to experience it, their beliefs may be wildly inaccurate, or may be influenced by attitudes of indifference toward others' suffering. For example, to the extent the respondents are ignorant of the real pains and deprivations of imprisonment, they will underrate the severity of prison terms.

Surveys of convicts' and of ex-convicts' perceptions of the severity of various penalties may be more illuminating, because those respondents have some experience with such sanctions and are not indifferent to their own suffering. But such data are not yet available.<sup>35</sup> Perhaps, severity would best be measured by determining what punishments do to people in fact; for example, what kinds of opportunity-loss and psychic deprivations they typically inflict. This research would be difficult and has not yet been attempted in any systematic fashion.

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<sup>32</sup> For discussion of the technique for rating crimes' seriousness used by Minnesota's Sentencing Guidelines Commission, see von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 197-99. The seriousness ratings used by the Oregon Parole Board in its parole release guidelines are summarized in Taylor, *In Search of Equity: The Oregon Parole Matrix*, 43 FED. PROBATION 52 (1979).

<sup>33</sup> See von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 197-99.

<sup>34</sup> Sebba, *Some Explorations in the Scaling of Penalties*, 15 J. RESEARCH CRIME & DELINQ. 247 (1978).

<sup>35</sup> One study that directly assesses prisoners' severity perceptions is a survey of prisoners at Rahway State Prison in New Jersey. P. Shelly & R. Sparks, *Crime and Punishment* (unpublished paper presented at the 1980 Annual Meeting of the American Society of Criminology, Nov. 1980). Shelly and Sparks feel, however, that substantial further inquiry is needed.

The absence of such data complicates the task of comparing severities of different kinds of sanctions—e.g., comparing fines with probationary sentences, or probationary sentences with short jail terms. The formal sentencing structures adopted in this country to date, however, primarily concern the use of confinement in state prisons. For prison sanctions, two simplifying assumptions seem appropriate: (1) Imprisonment is more severe than alternative sanctions; (2) the severity of different terms of imprisonment can be compared by comparing their durations.

Both assumptions are, concededly, oversimplifications. The first is true only if one sets aside the death penalty; even then, short stints in state prison may be comparable in severity with county jail terms and with probation under onerous conditions. The second assumption disregards the diversity of living conditions in different institutions; a longer term in a more humane, less regimented facility may be comparable in severity to a shorter term in a worse or more harshly run one. Nevertheless, these assumptions accord with common sense—and are at least crude approximations of reality.

### C. RELEVANCE OF PRIOR CONVICTIONS

In assessing an offender's deserts, is it appropriate to consider whether or not he has a record of prior convictions? Here, some disagreement exists among desert theorists.

George Fletcher<sup>36</sup> and Richard Singer<sup>37</sup> have maintained that the presence or absence of prior convictions is irrelevant to an offender's deserts. The person has been punished already for his prior convictions, and hence those convictions should not affect the quantum of his deserved punishment for the current crime.

My own view<sup>38</sup> has been that first offenders deserve to be penalized somewhat less harshly than those previously convicted. Punishment, I argue,<sup>39</sup> not only entails a judgment that the behavior is wrong, but involves moral disapproval directed at the actor for that wrong. The first offender's plea for reduced punishment addresses the inference that is made from (1) the judgment about the wrongfulness of the act, to (2)

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<sup>36</sup> G. FLETCHER, *RETHINKING CRIMINAL LAW* 460-66 (1978); see also Fletcher, *The Recidivist Premium*, *CRIM. JUST. ETHICS*, Summer/Fall 1982, at 54.

<sup>37</sup> R. Singer, *supra* note 15, at 67-74.

<sup>38</sup> von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 *MINN. L. REV.* 591 (1981) [hereinafter cited as von Hirsch, *Desert and Previous Convictions*].

<sup>39</sup> In *DOING JUSTICE*, *supra* note 5, at 84-88, I had argued that first offenders deserve to be penalized less because (given conduct of equal harmfulness) a first offense suggests a lower degree of culpability than a second or third. I subsequently became dissatisfied with this culpability argument, and hence shifted to the rather different account set forth in von Hirsch, *Desert and Previous Convictions*, *supra* note 38.

the judgment of disapproval directed at the actor.<sup>40</sup> On this view, the absence of a prior criminal record would have a modest severity-reducing role: a first offender would be entitled to somewhat less punishment than would be deemed deserved in a hypothetical desert scheme that disregarded prior criminality, but repeat offenders would lose this favored status.<sup>41</sup>

We need not debate this issue further here, for it suffices to look to what these two views have in common. Their common feature, of course, is that they restrict the role of prior criminal record. On either theory, a scheme that gives heavy or predominant emphasis to prior criminality would not comport with desert.<sup>42</sup>

#### D. CARDINAL PROPORTIONALITY: WHAT IS A "REASONABLE" PROPORTION?

Cardinal proportionality, as explained earlier,<sup>43</sup> requires that a reasonable proportion be maintained between the absolute quantum of punishment and the gravity of the criminal conduct. The scale should not be so inflated that lesser criminal conduct is severely punished, nor should it be so deflated that grave offenses are punished leniently. The question of cardinal proportionality has not received much attention,<sup>44</sup> but I have suggested an argument for why such a requirement exists:<sup>45</sup>

The penalty scale ought not be inflated so much that non-serious crimes also receive severe penalties (severe, that is, in [the] sense of being very unpleasant, given the prevailing tolerances for suffering). Severe punishments for non-serious offenses overstate blame: the offender is being treated as more reprehensible than the harmfulness of his acts (and the extent of his culpability) justify. This objection holds even if the whole

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<sup>40</sup> The point is explained more fully in von Hirsch, *Desert and Previous Convictions*, *supra* note 38, at 601-02, as follows:

Although it would be wonderful if people's moral inhibitions were strong enough to keep them from wrongdoing at all times, we know that even those who ordinarily refrain from misconduct may have their self-control fail in a moment of weakness or wilfulness. We wish to condemn the person for his act, but accord him some respect for the fact that his inhibitions against wrongdoing have (to our knowledge) functioned on previous occasions, and show some sympathy for the all-too-human frailty that can lead someone to such a lapse. This we do by showing less disapproval of him for his first misdeed. . . . In so doing, we distinguish—in the degree of our willingness to disapprove—between (1) the actor who on one occasion has committed a wrong but has previously maintained his inhibitions against such conduct, and (2) the actor who consistently has failed to show self-restraint. With the latter, more than a momentary lapse is involved. As the act becomes more typical of the way he has behaved, we become more ready not only to judge the act to be wrong, but to visit our disapproval on him for that act.

<sup>41</sup> *Id.* at 613-15, 622-23.

<sup>42</sup> *Id.*; see *infra* text accompanying notes 101-02.

<sup>43</sup> See *supra* text accompanying note 19.

<sup>44</sup> The available discussions are DOING JUSTICE, *supra* note 5, at 91-94; J. KLEINIG, *supra* note 15, at 110-133.

<sup>45</sup> DOING JUSTICE, *supra* note 5, at 91-92.

scale has been elevated so much that the penalty ranks low in comparative harshness alongside other penalties. Irrespective of other penalties, when an offender has been visited with much suffering, the implicit condemnation is great. Punishing someone with several years' imprisonment—once the painfulness of that sanction is understood—connotes that he must be very reprehensible to deserve *that*; and if other transgressors are made to suffer more, that only implies that they are still more blameworthy.<sup>46</sup>

The notion of a "reasonable proportion" between the gravity of the crime and the absolute magnitude of its punishment is, however, an imprecise notion. One needs to decide whether the cardinal-proportionality requirement leaves room for other considerations in deciding among alternative proposed magnitudes-of-scale, and what those other considerations might be.

Suppose that, as a member of a sentencing commission, one is writing guidelines for the decision whether or not to imprison (the "IN-OUT" decision). Suppose the rulemaker is using a two-dimensional grid for its standards, with an index of seriousness of crimes as the vertical axis and a criminal history index as the horizontal axis.<sup>47</sup> Here, one should have little difficulty deciding that less serious conduct, in the lower area of the grid, does not deserve a severe sanction and hence should not be punished by imprisonment. One should, similarly, be able to decide that the most reprehensible conduct, in the grid's upper area, deserves a severe penalty such as imprisonment.<sup>48</sup> This can be pictorially represented as in Figure 1. Thus, the standards must be written in such a manner as to ensure imprisonment in the upper shaded area, and to avoid imprisonment in the lower shaded area.

The problem will be to decide where, between these upper and lower ranges, the IN-OUT line should be drawn. Should it be closer to (but not touching) the upper shaded area? Or closer to the lower shaded area? Or just at the median point between them? The notion of a reasonable proportion between the gravity of the crime and the severity of its punishment is not precise enough to furnish a ready answer. Any of these proposed locations for the IN-OUT line would seem consistent with cardinal proportionality. It thus seems proper to invoke non-desert considerations to help decide the issue.<sup>49</sup> But *which* considerations?

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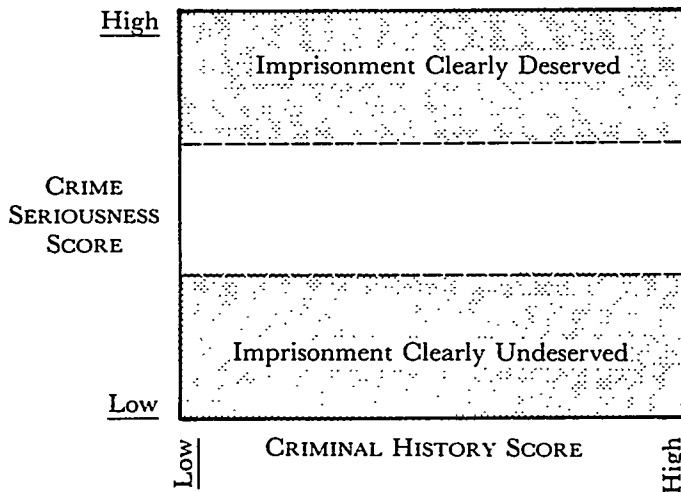
<sup>46</sup> *Id.*

<sup>47</sup> For fuller discussion of the use of such two-dimensional grids, see *infra* text accompanying note 90. Note that in a desert model, the horizontal axis would be solely a criminal history score, rather than an "offender score" comprising the criminal record plus other information concerning the offender's background. See *infra* text accompanying notes 91-95.

<sup>48</sup> von Hirsch, *Utilitarian Sentencing*, *supra* note 13, at 788-89.

<sup>49</sup> *Id.*; DOING JUSTICE, *supra* note 5, at 96-97.

FIGURE 1  
REQUIREMENTS OF CARDINAL PROPORTIONALITY FOR  
IN-OUT STANDARDS



Should crime prevention be introduced to decide magnitude questions where the desert principle leaves the choice open? Some crime-control strategies would have to be ruled out because they would upset the *internal* ordering of penalties on the scale; this would be true, for example, of a predictive strategy.<sup>50</sup> Not all crime-control rationales would present this problem, however. A deterrence strategy might be used, for example, to decide the elevation of the IN-OUT line between the shaded areas in the preceding figure, without affecting the relative ranking and spacing of penalties.<sup>51</sup> In *Doing Justice*, I did in fact suggest just this: that where the commensurate-deserts principle was indifferent as between two possible magnitudes-of-scale, opting for the scale having the greater deterrent usefulness would be appropriate.<sup>52</sup>

Given the limitations of our knowledge, however, I now doubt whether we can rely on crime-control considerations in this fashion. As will be apparent below, it is not even possible to gauge reliably the deterrent effects of changes in penalty levels for particular offense catego-

<sup>50</sup> This is because a predictive rationale requires one to decide comparative severities on the basis of risk, rather than on the basis of the gravity of the criminal conduct. See *infra* text accompanying notes 91-109.

<sup>51</sup> This assumes we are using deterrence to help decide *system-wide* severity levels. However, an exemplary-punishment strategy that picked out selected offenses or offenders for enhanced punishment solely on the basis of the expected deterrent effects *would* infringe on the parity and ordinal-proportionality requirements of desert.

<sup>52</sup> *DOING JUSTICE*, *supra* note 5, at 93 n.\*.

ries.<sup>53</sup> It is thus unlikely that we are, or shall in the foreseeable future be, in a position to judge the *systemwide* deterrent effects of increasing or decreasing by a few notches the severity of the penalty scale as a whole.

What other considerations might be used? The Minnesota sentencing guidelines set an interesting precedent: to rely on the availability of penal resources. Minnesota's sentencing commission made existing prison capacities decisive of the aggregate use of imprisonment under the guidelines.<sup>54</sup> Desert was then invoked to decide the distribution of these resources—that is, to decide which defendants should be sent to prison and for how long. This meant the *slope* of the IN-OUT line was decided by reference to desert principles, and hence was made fairly flat so as to give greater emphasis to the seriousness of the crime than to the criminal record.<sup>55</sup> The *elevation* of the line on the scale was based on the availability of prison space. Since prison space was limited, the line came to be located fairly high so as to imprison chiefly those convicted of serious offenses such as those involving actual or threatened violence.<sup>56</sup>

This technique seems sensible enough for Minnesota, which historically has exercised restraint in the construction and use of prisons.<sup>57</sup> But what of a jurisdiction that happens to have been prodigal (or frugal) in the extreme about the use of prisons? If availability of resources is relied upon in an extremely "prodigal" or "frugal" state, might not the result be imprisoning the majority of felony offenders or almost none of them?

We might begin to resolve this problem by combining considerations of resource availability with normative judgments about cardinal proportionality. Drawing the IN-OUT line on the basis of availability of prison resources would be only the first step. Then, the rulemaker would examine whether the line, thus tentatively located, is consistent with or infringes cardinal-proportionality constraints.

Suppose the state has extremely little prison space that meets constitutional standards. In that event, an IN-OUT line drawn on the basis of existing prison resources would be crowded high into the upper portion of the grid, as shown on Figure 2.<sup>58</sup>

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<sup>53</sup> See *infra* text accompanying note 83.

<sup>54</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, 176-80.

<sup>55</sup> This is a somewhat simplified description. For a fuller discussion, see *id.*, 181-91; *infra* text accompanying notes 107-08.

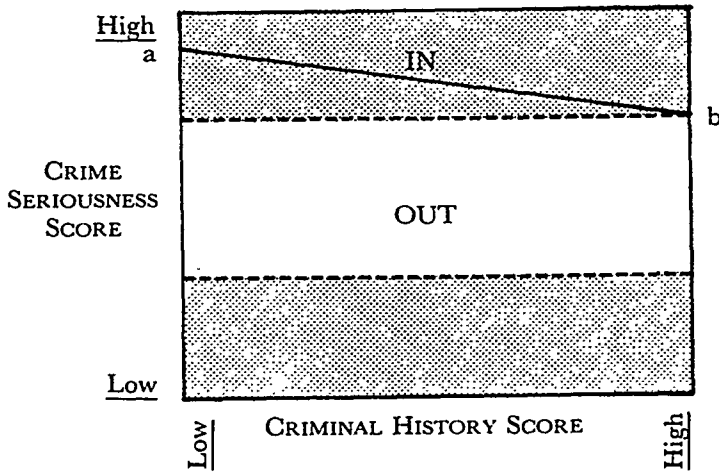
<sup>56</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 181-91. (Note that the Minnesota grid has a different format, with the least instead of the most serious offenses at the top of the grid.)

<sup>57</sup> *Id.* at 179.

<sup>58</sup> Note the relatively "flat" slope of the line, reflecting a desert rather than a predictive model for allocating the available prison space. This issue is discussed more fully *supra* text accompanying notes 36-42; *infra* text accompanying notes 101-06.

FIGURE 2

EXAMPLE OF EXCESSIVELY LENIENT IN-OUT LINE: MORE PRISON  
RESOURCES NEEDED



Line ab is proposed IN-OUT line

Examining this line, the rulemaker could make the judgment that it is unacceptable. By impinging on the upper shaded area of the grid, it infringes the requirement of cardinal proportionality.<sup>59</sup> The line is so high that very serious crimes, manifestly deserving of severe punishment, will not be penalized by imprisonment, and will have to receive lesser sanctions. The sentencing commission should recommend the funding of additional prison space, so as to lower the IN-OUT line below the shaded area.

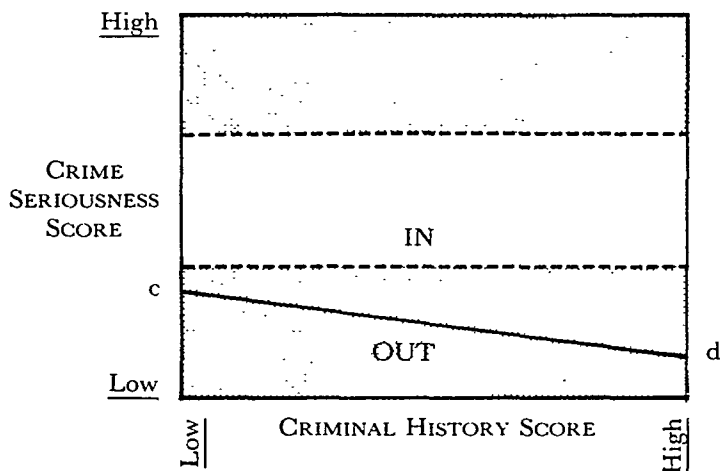
Suppose, conversely, the jurisdiction has relied heavily on imprisonment and thus has extensive prison facilities. In that event, an IN-OUT line drawn on the basis of available space could drop far down on the grid, as shown on Figure 3. Examining this proposed IN-OUT line, the sentencing commission should again judge it unacceptable. It likewise infringes cardinal proportionality by impinging on the lower shaded area. The line is placed so far down that not only serious crimes but intermediate and lesser offenses would be punished by the severe sanction of imprisonment. The commission should in that event decide on a less-than-full utilization of available prison space so as to raise the IN-OUT line above the shaded area.

<sup>59</sup> See *supra* text accompanying notes 47-48.



FIGURE 3

EXAMPLE OF EXCESSIVELY SEVERE IN-OUT LINE: PRISON RESOURCES SHOULD BE REDUCED

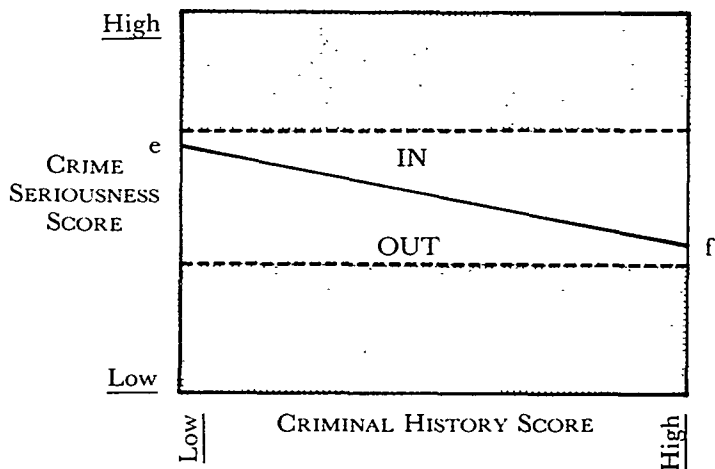


line cd is proposed IN-OUT line

Suppose, finally, the situation is similar to Minnesota's. Locating the IN-OUT line on the basis of available prison space would place it between the two shaded areas, as shown on Figure 4.

FIGURE 4

EXAMPLE OF ACCEPTABLE IN-OUT LINE: USE CURRENT PRISON RESOURCES



line ef is proposed IN-OUT line

In that event, the rulemaker would not be violating cardinal-proportionality constraints by relying on resource availability for deciding the aggregate amount of imprisonment to be used.

Does this provide a unique solution? Manifestly, it does not. The IN-OUT line in Figure 4 could be raised or lowered somewhat without impinging on the prohibited shaded areas. But as a practical matter, making a case for raising or lowering the line in this fashion will not be so easy. The high cost of prison space (as well as notions of parsimony<sup>60</sup>) would militate against lowering the line so as to send more people to prison. Political constraints are likely to militate against raising the line so as to make the system more lenient.<sup>61</sup> In practice, there is likely to be less ambiguity about the decision than there would be in theory.

It should be emphasized that the foregoing reasoning holds only for decisions about the absolute magnitude and anchoring points of the penalty scale. Once the decision about the appropriate elevation for the IN-OUT line has been made (with whatever imprecision and even arbitrariness that decision may involve) the rulemaker becomes bound by the much more definite *internal* scaling requirements of desert—that is, by the requirements of parity and ordinal proportionality. The imprecision involved in deciding the elevation of the IN-OUT line would not justify tilting the *slope* of that line so as to give predictive rather than desert considerations primacy in the relative severity of punishments.<sup>62</sup> Nor would it justify treating desert constraints as mere outer boundaries within which individual defendants' punishments could be varied on utilitarian grounds as the neopositivists have proposed.<sup>63</sup> Once the IN-OUT line has been fixed, cases above the line should get prison sentences and cases below it should get lesser penalties, except in special

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<sup>60</sup> DOING JUSTICE, *supra* note 5, at 136.

<sup>61</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 180.

<sup>62</sup> See *infra* text accompanying notes 103-04.

<sup>63</sup> von Hirsch, *Utilitarian Sentencing*, *supra* note 13, at 788-89. In his most recent book, Norval Morris blurs this essential distinction. N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 179-209 (1982). Morris quotes, *id.* at 203, a passage in which I assert that utilitarian considerations might properly affect decisions about the *magnitude* of a penalty scale. von Hirsch, *Utilitarian Sentencing*, *supra* note 13, at 788. This, he says, means I am somehow conceding that desert is merely a limiting principle in deciding relative severities of punishment. It means no such thing. Instead, I am suggesting that although desert provides limits rather than unique answers in fixing the penalty scale's absolute anchoring points, it should be the *decisive* principle in fashioning the internal structure of the scale—that is, the *comparative* severities of punishment within the scale. *Id.* at 789. To decide comparative severities in part on utilitarian grounds, as Morris is proposing, still violates the requirements of parity and ordinal proportionality.

cases where there are aggravating or mitigating circumstances involving increased or reduced harm or culpability.

The foregoing thoughts about cardinal proportionality are a tentative sketch, at best. Much more debate is needed before an adequate theory of cardinal proportion evolves.

#### IV. EVALUATING A FORMAL SENTENCING STRUCTURE IN DESERT TERMS

If desert imposes the three requirements of parity, ordinal proportionality, and cardinal proportionality, how does one determine whether and to what extent a formal sentencing structure meets these requirements? Here are some suggestions.

##### A. ASSESSING A SYSTEM'S DESERT-PARITY

The best way of gauging parity in the desert sense would be to assess the seriousness of various crimes, and then (holding the criminal history constant) to determine the extent to which the system calls for similar penalties to be imposed on those whose crimes have the same seriousness-rating. This is not now feasible, because it would require agreed-upon criteria for rating seriousness.<sup>64</sup> There are, however, some alternative approaches to assessing parity.

Consider, first, a jurisprudential analysis of a system, that is, an analysis of the system on its face. A formal penalty system will designate certain factors that decide the normally recommended disposition. If the system has a two-dimensional grid, those factors will be the offense score and the various factors which, taken together, comprise the offender score.<sup>65</sup> In a system which has no grid, identifying the factors which determine the normally recommended disposition will still be possible. In California's system, for example, these are the type of crime of which the offender is convicted and certain "enhancements" based on violence or property loss in commission of the present crime and on the prior criminal record.<sup>66</sup> Once one identifies the determinative factors, one can examine whether and to what degree they relate to the seriousness of the criminal conduct (or to the extent and gravity of his past criminal record). To the extent those factors are not so related, persons whose criminal offense (and criminal history) are the same can receive unequal sentences. Once this is done, the same analysis can be per-

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<sup>64</sup> See *supra* text accompanying notes 20-27.

<sup>65</sup> For a discussion of the structure of a sentencing grid, see *infra* text accompanying note 90.

<sup>66</sup> For a description of the California statute, see Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L. J. 5 (1978).

formed on the aggravating and mitigating factors that warrant a departure from the normally recommended sentence. To what extent do these concern the harm or culpability of the criminal conduct? To what extent do they relate instead to future criminal conduct or administrative concerns? The more those factors are desert-related, the more they help ensure that those whose conduct is equally blameworthy will receive equal punishments.

Another matter that can be examined jurisprudentially is the breadth of the offense categories. The broader the categories are, the more they may cover conduct that varies in its degree of seriousness (unless some mechanism is provided in the guidelines for distinguishing the conduct's seriousness within these broad categories).<sup>67</sup> This has been a problem particularly in California and in some other states where the legislature has set the sentencing standards.<sup>68</sup>

In studies of the system in actual operation, some statistical measures are possible. One method is to identify subgroups of offenders who have similar current offenses and similar criminal histories. Within such subgroups, one can then examine (1) to what extent offenders receive similar dispositions, and (2) what factors best account for any differences. This technique requires the evaluator to judge similarity, but it obviates the need for formal seriousness-rankings.<sup>69</sup> We can expect to find some differences of outcome within the subgroups. Much of the point of the research would be to examine those differences closely, to determine which features of the cases might account for them, and to analyze whether and to what extent those features are germane to desert. The latter analysis can be done qualitatively, by arguing the pros and cons of whether a given item bears on harm or culpability.

In field studies of the system's operation, one can assess whether and to what extent decisionmakers explicitly consider questions of desert-parity when they decide penalties. To what extent do decisionmakers in individual cases compare the proposed disposition for the particular case with dispositions for other cases that seem as serious, or more or less so?

#### B. ASSESSING A SYSTEM'S ORDINAL PROPORTIONALITY

To assess ordinal proportionality, one ideally would need, again, agreed-upon criteria for the seriousness of crimes and for the severities of

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<sup>67</sup> The new Pennsylvania sentencing guidelines, for example, subcategorize the broadest offense categories such as robbery and burglary. Penn. Sentencing Guidelines § 303.8, *reprinted in* 12 Pa. Admin. Bull. 431 (1982).

<sup>68</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 193.

<sup>69</sup> It also eliminates the need for deciding what weight should be given prior convictions, since only those offenders with similar criminal histories are being compared.

punishments. In the absence of such measures,<sup>70</sup> what proxies can be devised?

As an illustration, let us consider the Indiana sentencing code. Todd Clear<sup>71</sup> has estimated that, were the code implemented as written in 1976, offenders would serve time according to the scale set out in Table 1.

TABLE 1  
INDIANA PENALTIES

<u>Crime (First Offense)</u>	<u>Duration of Confinement</u>
Rape	11.0 years
Armed Robbery	4.9 years
Unarmed Robbery	4.7 years
Burglary	3.8 years
Theft	1.2 years

To determine whether this scale satisfies the requirements of ordinal proportionality, one would need to examine whether the penalty for any crime on the scale is "out of line" in any of the following senses:

- Does any crime receive greater punishment than offenses that are more serious, or lesser sanctions than offenses that are less serious?
- Is the sanction for any crime "crowded" too close to the sanctions for other crimes that are substantially more or less serious?

Assuming one lacks formal criteria of seriousness, one might try to answer these questions as follows.

One could begin by inspecting the scale visually and picking out those penalties that intuitively seem to be out of line. Using this intuitive test on the Indiana scale, no crime is obviously misplaced in rank-order, but some spacing decisions do appear odd. One is the almost minuscule space between unarmed and armed robbery. Another is the relatively small step-up between burglary and robbery. The next question would be: can one justify these spacing decisions?

In answering, one might consider Richard Sparks' suggestion: that in assessing the harm component in the seriousness of crimes, we look to the actual consequences and risks of criminal acts.<sup>72</sup> While systematic empirical studies of the kind Sparks suggests are unavailable, one could make qualitative comparisons between crimes.

Take, for example, the Indiana Code's treatment of unarmed versus

<sup>70</sup> See *supra* text accompanying notes 20-27.

<sup>71</sup> Clear, Hewitt & Regoli, *supra* note 30, at 442. For a critique of the Indiana sentencing statute, see von Hirsch, *The New Indiana Sentencing Code*, *supra* note 30.

<sup>72</sup> See *supra* text accompanying note 24.

armed robbery. If one considers the threatened harm, armed robbery (which in that state is defined as robbery with any "deadly" weapon, including a knife as well as a gun<sup>73</sup>) seems substantially the more serious offense: the threat is of *deadly* force. The degree of fear instilled in the victim can be expected to be correspondingly greater. Seriousness, of course, is a function of culpability as well as harm. But it is difficult to see differences in culpability that would offset this substantial apparent difference in threatened harm; both are intentional offenses, ordinarily with few mitigating factors. One might try to pursue this qualitative comparison further by bringing to bear any available data from victimization surveys. But the conclusion is likely to be that the gap in seriousness between armed and unarmed robbery is substantially greater than that reflected by the very narrow penalty-difference in Indiana's punishment scale. If so, ordinal proportionality appears to have been infringed.

The other question raised by visual inspection of the Indiana scale is the treatment of burglary versus robbery. The prescribed prison term for burglary is about eighty percent of that for robbery. Again, one could try to analyze the harm and culpability involved in the two offenses. Robbery involves threatened violence, coupled with a substantial risk that actual violence may occur. Burglary ordinarily involves theft, invasion of privacy, and the generation of some sense of personal insecurity. But the burglar ordinarily does not intend to confront the victim or threaten violence, and the risk of personal injury occurring is ordinarily much smaller than it is in robberies. (The latter point might be checked by examining data in victimization surveys about the incidence of actual violence in burglaries and robberies.) One could pursue this kind of analysis further, but the likely conclusion is that the seriousness-distance between the two offenses is greater than that recognized by Indiana.

A weakness in this procedure is its first step. To the extent the scale has ranking problems that do not appear on visual inspection, those problems would not receive the scrutiny of the subsequent steps. One could avoid this first step by examining *each* penalty in relation to those above and below it. That would, however, be a laborious process. The first step is thus a short-cut, but one that risks overlooking something.

The issues become slightly more complex when the scale is two-dimensional, with one axis being the current offense and the other being the prior offenses. If, in such a two-dimensional scale, a first offense of robbery gets less than a third burglary, is that result ordinally disproportionate? The answer would depend on the criteria being applied with

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<sup>73</sup> IND. CODE ANN. § 35-42-5-1 (Burns 1979 & Supp. 1982).

regard to the weighing of prior criminal conduct.<sup>74</sup> What one could do, however, is to see whether there was any misalignment in the scale when prior record was held constant. In other words, one could inspect each vertical column on the matrix to see whether there was any misranking or misspacing within that column.

Assuming the system, on its face, satisfies these approximate tests of ordinal proportionality, one can then statistically examine the distribution of penalties as they actually are imposed. In addition, field studies can examine the degree to which decisionmakers consider questions of ordinal proportionality in their daily decisions to impose punishments.

### C. EVALUATING CARDINAL PROPORTIONALITY IN A SYSTEM

Can we say anything about this issue until a more fleshed-out theory of cardinal proportionality has been developed? Let us consider Indiana's penalty structure again. I have just suggested that the state's prescribed term of 3.8 years' imprisonment for burglary is so close to the prescribed penalty for the more serious crime of armed robbery as to infringe ordinal proportionality. This, however, does not tell us whether the proper solution is to keep the burglary penalty where it is and expand the penalty structure upward so as to give robbery and worse offenses still severer penalties, or instead, to compress the penalty structure downward by reducing the burglary penalty and making suitable adjustments to other penalties further down the scale. To answer such questions, we must inquire whether Indiana's scale meets requirements of cardinal proportionality.

Indiana's scale does seem quite severe—particularly in its imposition of lengthy prison terms on intermediate-level crimes such as common burglary. We might *feel* that such sanctions are disproportionately harsh and hence wish to see the scale suitably reduced. Can we, however, give analytical content to this intuitive judgment?

If one examines that judgment, one finds that it contains three elements: (1) a judgment about the magnitude of penalties: the notion that some penalties (including 3.8 years' imprisonment) are, and some are not, severe in the absolute sense of depriving the punished person of interests having critical importance in any human being's life; (2) a judgment about the magnitude of crimes: the idea that some crimes do, and some do not, invade interests that are of such critical importance; and (3) an implicit judgment of what is, and what is not, an acceptable norm of proportion: for example, should penalties that are cardinally severe (in the sense of invading a person's fundamental interests) be reserved for crimes that do themselves invade the victim's fundamental

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<sup>74</sup> See *supra* text accompanying notes 36-42.

interests? When people disagree about cardinal proportionality they may be differing about any one of these issues.

### *1. Cardinal severity*

What does it mean to say that Indiana's burglary penalty of 3.8 years' imprisonment is severe in a cardinal sense—that is, severe irrespective of where Indiana has put burglary on its penalty scale? One can make sense of that judgment by looking at what interests of the offender the sanction intrudes upon and how important those interests are. This would entail both factual and moral assessments. The factual assessments involve such matters as these: (1) most people have only about forty or fifty years of healthy adult existence, so that four years' imprisonment involves deprivation of a significant portion, perhaps as much as one-tenth, of that existence; and (2) prisons are constricting, dangerous, and boring places—so much so that four years' confinement is four years of misery. The moral judgments involve such matters as the high value we wish to place on personal liberty, which imprisonment so drastically restricts. These constitute reasons for the conclusion that four years' confinement is (cardinally) a severe penalty. Such a conclusion is not indisputable, of course. Someone might argue that prisons are nicer places, or that we overvalue personal liberty. But how plausible would such claims be?

### *2. Cardinal seriousness*

Judgments of cardinal seriousness of criminal conduct may be made in somewhat similar fashion. Seriousness, as discussed earlier, involves issues of both harm and culpability. The harm element can be assessed by examining the importance of the interests infringed or threatened by the conduct. With robbery, for example, the great importance of the threatened interest is obvious: the victim's physical well-being is put at risk. If we turn to burglary, it is not obvious that interests of such central importance are infringed. The victim's life normally is not directly threatened, and the risk of injury is relatively small. Property is often lost, but the individual's livelihood normally is not endangered. There is an invasion of privacy, although not one nearly as pervasive and enduring as the loss of privacy and autonomy involved in long-term imprisonment. Again, someone might dispute these assessments by producing evidence, for example, that the danger of personal injury in burglary is greater, or by placing a higher valuation on the kind of privacy-loss involved.



### 3. *The Norm of Proportion*

Suppose one were to conclude that four years' imprisonment is cardinally severe, and that a first-time burglary is cardinally of only intermediate gravity. Is Indiana's penalty then acceptable? The answer depends on the norm of proportionality one is willing to accept.

Cardinal proportionality, as suggested earlier,<sup>75</sup> does not furnish a unique solution for the relation between crimes and their punishments. But it does impose limits on what punishments are appropriate; for example, it would certainly rule out the use of severe punishments for minor crimes. Whether cardinally severe punishments are ever permissible for intermediate-level crimes may be a somewhat more debatable matter. The evaluator, however, can set the stage by making explicit what kind of proportionality-norm would have to be espoused in order to uphold Indiana's scale. By making clear that the scale uses a norm-of-proportion that visits severe punishment on offenses that are only of intermediate gravity, the evaluation can provide the basis for judgments about the justice of this penalty scheme.

## V. DISTINGUISHING DESERT AND PREDICTIVE ELEMENTS IN A FORMAL SENTENCING STRUCTURE

Formal sentencing structures typically represent a compromise among diverse philosophical views. Some of the persons who shape the system may be particularly concerned with imposing commensurable, deserved penalties. Others are little concerned with desert and are primarily interested in maximizing the crime-control effectiveness of criminal penalties. The system tends to reflect these heterogeneous views. If one looks at California's or Minnesota's or other states' systems, one sees some features which appear to be desert-oriented and others that are explicable only on non-desert grounds.<sup>76</sup> Moreover, the drafters often do not state the precise philosophical mix that is intended, or else state a rationale that they themselves partially disregard, wittingly or not.

This heterogeneity makes it useful, when examining a formal sentencing structure in a particular jurisdiction, to try to assess what mixture of aims the structure reflects. To what extent can its features be justified under the principle of commensurate deserts? To what extent does it have features which infringe this principle and could be explained only on crime-control grounds? To answer such questions, one needs a systematic account of how the desert and non-desert elements of a system are to be distinguished.

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<sup>75</sup> See *supra* text accompanying notes 47-61.

<sup>76</sup> von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 1, at 296-97.

## A. WHICH UTILITARIAN AIM?—FOCUSING ON PREDICTION

When a system diverges from desert requirements in favor of utilitarian aims, a variety of possible aims could be involved. This section will focus on only one such aim: predictive restraint (or as it is now sometimes called, "selective incapacitation"). Predictive restraint means reliance on predictions of future criminal conduct to determine whether, and for how long, a convicted offender is to be incapacitated through imprisonment or other means of restraint. A predictively-oriented sentencing structure can be described because a limited capacity to forecast criminal conduct does exist. Actuarial forecasting methods have had some success in identifying offender subgroups having higher-than-average likelihoods of returning to crime.<sup>77</sup> The prediction techniques rely on such factors as type of crime committed, prior criminal record, age, employment, and drug history.<sup>78</sup>

It should be emphasized, however, that these forecasting methods are "successful" only in the restricted sense that they are not complete failures—that is, they predict somewhat better than random selection would. Existing prediction techniques account only for a small portion of the variability in subsequent behavior outcome.<sup>79</sup> Their use in sentencing decisions would *not* be likely to have much impact on overall crime rates.<sup>80</sup> Moreover, they are plagued with problems of overpredic-

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<sup>77</sup> D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING 41-67 (1978); Gottfredson, *Assessment of Prediction Methods*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 745-71 (N. Johnston, L. Savitz & M. Wolfgang 2d ed. 1970); Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 244-69 (A. Blumstein, J. Cohen & D. Nagin eds. 1978) [hereinafter cited as DETERRENCE AND INCAPACITATION]. For recent studies of "selective incapacitation," see J. CHAIKEN & M. CHAIKEN, VARIETIES OF CRIMINAL BEHAVIOR (1982); P. GREENWOOD, SELECTIVE INCAPACITATION (1982).

<sup>78</sup> See, e.g., Gottfredson, *supra* note 77.

<sup>79</sup> See, e.g., D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 77, at 49.

<sup>80</sup> Whichever sentencing rationale one chooses, one must bear in mind that the overwhelming bulk of cases do not result in apprehension and conviction for the crime committed. The criminal justice system convicts too small a percentage of criminal offenders to offer adequate leverage over crime rates. Levels of criminality respond, rather, to demographic and social factors that cannot readily be influenced by the criminal justice system—such as the percentage of youthful males in the population.

One prediction study, P. GREENWOOD, *supra* note 77, has promised striking crime-control gains through use of a "selective incapacitation" strategy. The Greenwood study develops criteria for identifying potential robbery offenders, derived from prisoner self-report studies. Those criteria are familiar enough, because they much resemble those of earlier prediction research: they concern an offender's criminal record, drug involvement, and employment history. One assertion the study makes (hardly a new one) is that such criteria help identify potential risks among felons facing punishment.

The novel claim in the Greenwood study, which has attracted extensive press attention, is its promised reduction in overall rates of robberies. The study projects a 15% decrease in aggregate robbery rates, without need for any expansion (indeed, with the promise of some

tion: most of those identified as potential recidivists will in fact be "false positives"—that is, persons who would not have been found to have offended again had they been permitted to remain at large.<sup>81</sup>

The situation is different with respect to the other three utilitarian rationales—deterrence, collective incapacitation,<sup>82</sup> and rehabilitation. Here, the requisite empirical knowledge is lacking entirely. A recent

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reduction) in prison populations. These projections are made on the basis of inferences about the number and crime rates of offenders principally responsible for robbery in the community—inferences that are, on any close scrutiny, poorly supported and not particularly plausible.

Greenwood studied a sample of incarcerated robbers. On the basis of their self-reports of past crimes committed, he types robbers into low, medium, and high-rate offenders; assigns a robbery-rate to the members of each group; and then, using these assumed rates, estimates the number of low, medium and high-rate robbers committing robberies in the community. Through this technique, he "finds" that a limited number of high-rate robbers are responsible for a large share of total robberies. Hence, identifying and incarcerating those he has identified as "high-risk" individuals would, he asserts, yield a large reduction in the overall rate of robberies.

The manifest defect of this projection method is that Greenwood has made no effort to study the activity of robbers in the community. He has merely studied the robbery rates of a small and probably unrepresentative sample of robbers—to wit, those who happen to be incarcerated and whose self-reports thus can easily be obtained. His report indicates, *id.* at xvii, that in California, the situs of his study, the probability of arrest and conviction for robbery is .03, and the probability of incarceration if convicted for robbery is .86; consequently, the probability of arrest, conviction, and incarceration for a given robbery is very small indeed: only .0258. The sample Greenwood has studied thus may represent a minute portion of the general population of robbers. Perhaps, as Greenwood supposes, committing more robberies may increase the probability of arrest, conviction and incarceration—and hence of inclusion in his sample. But that surmise, if true, may *also* mean that the sample is highly *unrepresentative* in its members' robbery rates. If that is the case, to estimate the number of robbers committing robberies in the community on the basis of the histories of members in this sample is simply fallacious. The study embodies one of the classic fallacies in social science research: the drawing of conclusions about frequently-occurring behavior in the community on the basis of the behavior of a small and possibly unrepresentative sample of individuals who have been removed from that community and whose histories thus can be easily studied. For a fuller discussion of the Greenwood study, see von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE (1983) (forthcoming).

<sup>81</sup> N. MORRIS, THE FUTURE OF IMPRISONMENT 62-73 (1974); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972). Recently, John Monahan reviewed the major statistical and clinical studies of violence prediction and found that all such studies involved a high incidence of false positives. J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 73-80, 101-04 (1981).

<sup>82</sup> The term "collective incapacitation" refers to those incapacitative strategies that impose a given period of restraint on *all* persons convicted of a given type of crime without attempting to predict which individual offenders are likely to recidivate. So long as some (even if by no means all) of the offenders thus imprisoned would have committed new crimes had they remained at large, this strategy will have an incapacitative effect by taking those persons out of circulation for a portion of their criminal careers. This strategy is discussed in J. WILSON, THINKING ABOUT CRIME 161-82, 198-209 (1975); Shinnar & Shinnar, *Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC'Y REV. 581 (1975); von Hirsch, *Giving Criminals Their Just Deserts*, 3 CIV. LIB. REV. 23 (1976).

report by a National Academy of Sciences panel concluded that present research on deterrence has not reached a point which permits the magnitude of deterrent effects to be measured with any reliability.<sup>83</sup> The report reaches a similar negative conclusion with regard to our ability to assess collective incapacitation.<sup>84</sup> With respect to rehabilitation, it is notorious that little or nothing is known of what features of a sentencing system might enhance or retard effective treatment.<sup>85</sup>

By omitting these other crime-control aims, the analysis is necessarily incomplete. Many features of various states' formal penalty systems may be explicable only because the drafters believed that those features would, say, enhance the system's deterrent effectiveness. Since nobody really knows what does or does not enhance deterrence, however, these beliefs must be left aside for the moment.

#### B. FROM DESERT TO PREDICTION: FOUR MODELS

Penalty schemes can be arrayed along a spectrum, reflecting the degree to which they seek to comply with the requirements of commensurate-deserts. At one end of the spectrum would be those schemes which place preeminent emphasis on commensurability. At the other end would be those systems that disregard commensurate-desert requirements and give paramount emphasis to predictive restraint. Within this spectrum, it is useful to identify four distinct models for penalty systems that differ from one another in the relative degree of emphasis they give to desert and to predictive considerations.

##### 1. *Desert Model*

A Desert Model is a penalty scheme that attempts rigorously to observe the requirements of parity, ordinal proportionality, and cardinal proportionality (to the extent that cardinal proportionality is now understood). Among those whose criminal conduct is equally blame-

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<sup>83</sup> DETERRENCE AND INCAPACITATION, *supra* note 77, at 15-63; see also C. TITTLE, SANCTIONS AND SOCIAL DEVIANCY: THE QUESTION OF DETERRENCE (1980); Brier & Fienberg, *Recent Econometric Modelling of Crime and Punishment: Support for the Deterrence Hypothesis?*, in INDICATORS OF CRIME AND CRIMINAL JUSTICE: QUANTITATIVE STUDIES 82-97 (S. Fienberg & A. Reiss eds. 1980); Ross, *Interrupted Time Series Studies of Deterrence of Drinking and Driving*, in DETERRENCE RECONSIDERED: METHODOLOGICAL INNOVATIONS 71-97 (J. Hagan ed. 1982).

<sup>84</sup> DETERRENCE AND INCAPACITATION, *supra* note 77, at 64-75.

<sup>85</sup> For evidence on the limited effectiveness of rehabilitative programs, see Report of the National Academy of Science's Panel on Research and Rehabilitative Techniques, in THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS 1-147 (L. Sechrest, S. White & E. Brown eds. 1979). Beyond these general problems of effectiveness, little research has been done on how the choice of treatment programs might affect sentencing decisions. A. VON HIRSCH & K. HANRAHAN, *supra* note 17, at 32-33.

worthy, no deviation in severity of punishment would be permitted on account of risk of future criminality.

### 2. *Modified Desert Model*

In this model, the principle of commensurate-deserts would continue to have the primary role in determining the relative severities of punishment. Variations in the punishment of equally deserving offenders would be permitted on predictive grounds, but those variations would be modest. Large departures from the requirements of parity and ordinal proportionality would continue to be barred as unjust.<sup>86</sup> The model therefore represents a compromise, but one stressing commensurability.

### 3. *Modified Predictive (Neopositivist) Model*

The shift here is strongly away from desert and toward prevention of recidivism. The offender's predicted future conduct would normally determine the disposition, even when doing so would result in substantially unequal punishment of those convicted of similar criminal conduct, or would result in less serious crimes being punished more harshly than more serious ones. The requirements of parity and ordinal proportionality, in other words, would largely be disregarded. The model would, however, continue to apply outer limits barring *grossly* disproportionate punishments; severe sanctions could not be used for trivial infractions, and manifestly lenient punishments would be ruled out for the most serious crimes. Desert constraints would thus be relegated to providing extreme upper and lower bounds on the quanta of punishment. The recent American Bar Association report on sentencing recommends this approach.<sup>87</sup>

### 4. *Predictive Model*

Here, desert constraints would be disregarded entirely. The choice of whether to incarcerate, and for how long, would be made purely on predictive grounds. The system of indeterminate sentencing proposed by the National Council on Crime and Delinquency's Model Sentencing Act comes close to recommending this view.<sup>88</sup> One could, however, im-

<sup>86</sup> A. VON HIRSCH & K. HANRAHAN, *supra* note 17, at 18-19; see also Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J. L. & PSYCHIATRY 103 (1982).

<sup>87</sup> ABA TASK FORCE ON SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 12. For a critique of this view, see von Hirsch, *Utilitarian Sentencing*, *supra* note 13. Norval Morris has recently criticized the Task Force for giving desert too peripheral a role. N. MORRIS, *supra* note 63, at 202-04.

<sup>88</sup> Advisory Council of Judges, Nat'l Council on Crime & Delinq., *Model Sentencing Act*, 9

agine a determinate-penalty system embodying the same rationale: presumptive dispositions would be based purely on predictive factors, without regard to the gravity of the criminal conduct of which the offender was convicted.<sup>89</sup>

These four models will be useful, as the reader will see, as a heuristic device. They are not, however, exclusive: along the spectrum from desert to prediction, there could be various other stopping places.

#### C. DESERT VERSUS PREDICTION: WHAT DIFFERENCE DOES IT MAKE FOR A SENTENCING STRUCTURE?

To highlight the difference between the desert and predictive elements in a system, let us consider systematically the guideline format touched upon earlier—a system having a two-dimensional sentencing grid. The vertical axis would be the offense score, addressing the character of the offender's offense. The horizontal axis would be the offender score, representing aspects of the offender's prior criminal history, or other offender characteristics deemed relevant to the sentence. The cells of the grid would contain normally-recommended dispositions or ranges.<sup>90</sup> The rationale underlying such a grid could lie anywhere along the spectrum from a pure Desert Model to a pure Predictive Model, depending on how the offender and offense scores are specifically defined and on what degree of influence each score has over recommended sentences.

##### 1. *Use of Non-Crime Factors*

Consider, first, the offender score, the horizontal axis of the grid. The offender's criminal history—the number of prior felony convictions, and perhaps also the number of prior misdemeanor convictions—is assigned a certain number of points. In addition, there may or may not be points assigned to factors concerning the defendant's personal or social history. One indication of a predictive orientation is the extent of use of these non-crime factors.<sup>91</sup> Whereas desert is concerned with the blame-

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CRIME & DELINQ. 337 (1963); Advisory Council of Judges, Nat'l Council on Crime & Delinq., *Model Sentencing Act*, 2d ed., 18 CRIME & DELINQ. 335 (1972).

<sup>89</sup> Until last year, one might have been able to argue that such a scheme was unconstitutional on grounds that grossly disproportionate penalties constitute cruel and unusual punishment under the eighth amendment. After the Supreme Court decision of *Rummel v. Estelle*, 445 U.S. 263 (1980), however, this argument can no longer so readily be made. Justice Rehnquist's majority opinion asserts that virtually any degree of sentence severity, irrespective of how seemingly disproportionate to the gravity of the offense, is constitutionally permissible.

<sup>90</sup> A substantial number of sentencing and parole-release guidelines use this format. von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 1, at 305.

<sup>91</sup> By "non-crime factors" I mean factors not concerned with the characteristics of, or circumstances surrounding, the defendant's criminal conduct. Conceivably, some such fac-

worthiness of the defendant's criminal conduct, predictive restraint permits use of any information about the offender that bears on his subsequent likelihood of offending. That, as discussed earlier,<sup>92</sup> includes social status factors (e.g., education and employment) and certain personal characteristics (e.g., drug or alcohol dependence).

Someone subscribing to a predictive-incapacitative philosophy of sentencing is not *compelled* to use such non-crime factors. Among predictors of future criminality, there is considerable redundancy, as the predictive factors tend to be intercorrelated. This enables one to choose crime-related factors (principally, the defendant's criminal record) and exclude the non-criminal factors while retaining some predictive power.<sup>93</sup> Given the availability of this choice, the non-crime factors may be excluded from the offender score; and that exclusion may rest on grounds other than desert—for example, on grounds that social status factors are too closely linked with race and class. The absence of such factors in the grid, therefore, is no sure sign of desert orientation. But where such non-crime factors are present, their presence is an indication, albeit not by itself a decisive one,<sup>94</sup> of predictive orientation. This is most obviously the case where the offender score has been expressly developed and tested as a predictive index.<sup>95</sup>

## 2. *Manner of Use of Current Offense*

A desert rationale relies on the *seriousness* of the current offense. The offense score—the vertical axis of the grid—should thus grade offenses according to the rulemaker's judgment of their gravity, with the score increasing as the estimated harmfulness and culpability of the offense rises.

Prediction, by contrast, permits consideration of features of the current offense that have no bearing on its seriousness or that may even be

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tors—e.g., youthfulness or extraordinary social deprivation—could be relevant to desert as having bearing on the defendant's culpability. See *infra* text accompanying note 114. But one could identify such exceptions by examining the context in which such non-crime factors are employed.

<sup>92</sup> See *supra* text accompanying note 78.

<sup>93</sup> D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 77, chs. 5, 7.

<sup>94</sup> It is not decisive because other features of the system discussed in this section could override it. Suppose the system's offender score relies heavily on such predictive factors. The system may *still* be primarily oriented to desert if the offense-seriousness score carried the predominant weight in determining sentence severity and this predictively-oriented offender score influences dispositions only to a limited extent. See *infra* text accompanying notes 101-02.

<sup>95</sup> In the U.S. Parole Commission's guideline matrix, for example, the offender score was based on such a predictive index. D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 77, ch. 3. However, that predictive score has substantially less influence on those guidelines' prescribed prison terms than the matrix's seriousness-of-offense score. *Id.* at 144.

inversely related to its seriousness. To the extent that research shows that certain types of crimes—even the less serious ones—are associated with high recidivism rates, conviction for those types of crimes may be a predictor of future criminality. The use of the current offense in a manner that does not comport with its seriousness is, then, an indicator of predictive emphasis.<sup>96</sup>

### 3. *Quality of the Criminal Record*

It is, we noted above,<sup>97</sup> a matter of dispute whether the offender's prior criminal record has any bearing on how much punishment he deserves. If prior criminal record is deemed to bear on an offender's deserts, however, the relevant dimension of that record is its degree of blameworthiness; and that depends not only on how frequent, but how serious the prior offenses were. It has thus been suggested that the horizontal axis of the sentencing grid should reflect the "quality" of the criminal record, that is, the gravity as well as the number of prior crimes.<sup>98</sup>

A predictive view, by contrast, would permit one to treat the criminal record in a manner that has nothing to do with the degree of blameworthiness of the defendant's past choices. To the extent that lesser, but typically repetitive, prior crimes are better predictors of recidivism than more serious but less repetitive ones, offenders with records of such lesser offenses could be restrained for longer periods, since they represent greater risks. The extent to which the offender score focuses on aspects of the prior criminal record that do not bear on the degree of its blameworthiness is, therefore, an indicator of predictive emphasis. For example, a former provision in the U.S. Parole Commission's offender score deducted points for "age at first commitment": an offender who was younger when first convicted and confined fared worse on the score.<sup>99</sup> Youthfulness at time of first commitment has been found to be somewhat associated with recidivism.<sup>100</sup>

### 4. *Relative Weight Given Current Offense versus Prior Offenses*

This is, perhaps, the most important indicator. A desert model places primary emphasis on the gravity of the offender's current offense.

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<sup>96</sup> Something akin to this was found in the U.S. Parole Commission's guidelines. According to the guidelines before recent changes, an offender lost a certain number of points on the offender score—and therefore fared worse—if his current conviction was for check passing or auto theft, two of the least serious Federal crimes, because these lesser offenses were statistically associated with higher recidivism rates. *Id.* at 50-51.

<sup>97</sup> See *supra* text accompanying notes 36-42.

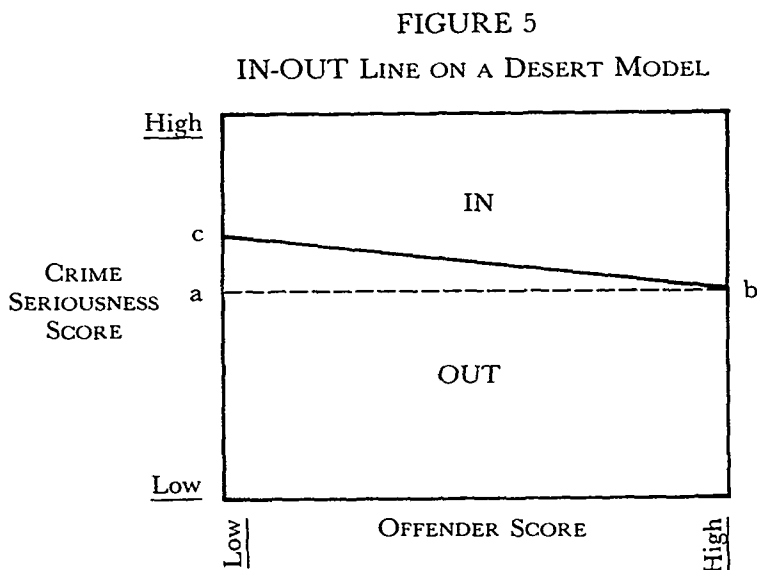
<sup>98</sup> von Hirsch, *Desert and Prior Convictions*, *supra* note 38, at 615-16, 620-21.

<sup>99</sup> D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 77, at 50-51.

<sup>100</sup> *Id.*



The prior record has much more limited significance: on the Fletcher-Singer view, it would have to be disregarded entirely; on my own view, the absence of prior convictions becomes a modest extenuating factor.<sup>101</sup> Consider the slope of the IN-OUT line on a sentencing grid, separating prison from non-prison sanctions. Because the gravity of the current crime, represented by the vertical axis on the grid, would carry the pre-eminent weight, the IN-OUT line would either have to be flat (the Fletcher-Singer view) or only slightly sloped (my view).<sup>102</sup> This is shown in Figure 5.



Dashed line ----- (ab) is IN-OUT line on Fletcher-Singer view.

Solid line ——— (cb) is IN-OUT line on my view.

Under a predictive rationale, by contrast, the offender score would carry the preeminent weight. Where that score has been explicitly devised as a predictive index, a predictively-oriented rationale would obviously require it to be emphasized. But the same holds where the offender score reflects only the prior criminal history. That history, too, has predictive significance—in fact, it tends to be the strongest single indicator of likelihood of recidivism.<sup>103</sup> Where the aim is predict and restrain, therefore, it is that dimension of the grid which should influ-

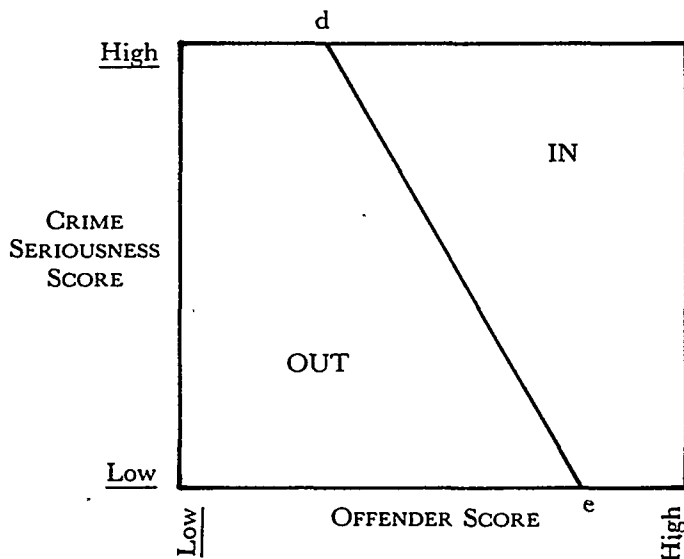
<sup>101</sup> See *supra* text accompanying notes 36-42.

<sup>102</sup> For a fuller explanation, see von Hirsch, *Desert and Previous Convictions*, *supra* note 38, at 621-26.

<sup>103</sup> See *supra* text accompanying note 93.

ence sentences most. This is shown<sup>104</sup> in Figure 6.

FIGURE 6  
IN-OUT LINE IN A PREDICTIVE MODEL



Solid line ——— (de) is IN-OUT line on predictive rationale.

The evaluator can, by thus examining the slope of the dispositional line, learn much about the implicit rationale of a sentencing system. A similar analysis can be done with durations of confinement to determine whether the seriousness dimension or the offender-score dimension has greater influence on the progression of prison-term lengths from cell to cell.<sup>105</sup>

It may be that the dispositional line is neither as flat as the desert line shown in Figure 5, nor as steep as the predictive line shown in Figure 6. That suggests a composite conceptual model, in which both desert and predictive elements are present. In such a composite, the slope of the line—its relative steepness or flatness—may suggest whether desert or predictive elements predominate.<sup>106</sup>

Line-drawing of this kind may also be useful for purposes of histori-

<sup>104</sup> von Hirsch, *Desert and Previous Convictions*, *supra* note 38, at 623-24.

<sup>105</sup> For a discussion on how to conduct that analysis, see von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 191-93.

<sup>106</sup> For a discussion of the slope of the dispositional line under such composite conceptual models, see von Hirsch, *Desert and Previous Convictions*, *supra* note 38, at 626-29.

cal comparison—i.e., to determine how much of a shift toward desert or prediction has taken place through adoption of a formal sentencing structure compared to practice before adoption of that structure. The Minnesota guidelines are a case in point. The Minnesota IN-OUT line is entirely flat in the left-hand portion of the sentencing grid, where most of the cases lie. It slopes down sharply in the grid's right-hand portion for persons with very long criminal records.<sup>107</sup> This represents a rationale which emphasizes desert for the bulk of the caseload, and shifts toward a more utilitarian approach for the relatively rare instances of extensively repeated convictions.<sup>108</sup> It is clear, however, that Minnesota's IN-OUT norms, taken as a whole, represent a substantial shift of emphasis toward desert, as compared with earlier judicial practice. Before enactment of the guidelines, the Minnesota sentencing commission's statistics suggest, judges *ordinarily* relied chiefly on the offender's prior criminal record in deciding whether offenders should be imprisoned.<sup>109</sup>

### 5. *Aggravating/Mitigating Factors*

Many formal sentencing structures have a list of aggravating and mitigating factors. The decisionmaker in the individual case is authorized to depart from the normal penalty or range, if he or she finds such factors to be present.<sup>110</sup> According to the parity requirements of desert, special circumstances warrant departures from the normally-prescribed disposition only if those circumstances bear on the harmfulness or culpability of the offender's criminal conduct.<sup>111</sup> On a predictive theory, by contrast, any special circumstances would be relevant that bear on the risk of recidivism posed by the defendant. Thus, one can go through each listed aggravating and mitigating circumstance and ask: does this relate to the harm or culpability? Or is it something that relates primarily to the likelihood of future crime?

This task will require a qualitative judgment. In some cases, the answer will be fairly apparent: if provocation by the victim is listed as a mitigating factor, this relates to the defendant's degree of culpability;<sup>112</sup> if "circumstances unlikely to recur"<sup>113</sup> is listed, that is plainly predictive. Other cases will be closer to call. Sometimes, the same factor may have

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<sup>107</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 189-90. The line hinges down at the right when one uses the grid format discussed here, instead of the transposed format that state uses. *See supra* note 56.

<sup>108</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 190-91.

<sup>109</sup> *Id.* at 181.

<sup>110</sup> *See, e.g.*, R. SINGER, *supra* note 15, at 75-95.

<sup>111</sup> DOING JUSTICE, *supra* note 5, at 100.

<sup>112</sup> *Id.* at 80.

<sup>113</sup> *See, e.g.*, MODEL PENAL CODE § 7.01(2)(h)(1962).

opposite significance depending whether it is used for desert or predictive purposes. Youthfulness, extraordinary social deprivation, and similar matters conceivably might be deemed mitigating factors on a desert rationale, on grounds that they reduce the defendant's culpability,<sup>114</sup> but serve as aggravating factors on a predictive rationale because they suggest a higher likelihood of recidivism.

### 6. *Special Provisions for Dangerous Offenders*

The presence of special provisions for dangerous offenders is, by definition, predictive. They may take various forms. One form is a schedule of enhanced penalties for offenders deemed to represent higher risks.<sup>115</sup> Another form is the retention of indeterminate sentences for offenders deemed especially violent.<sup>116</sup>

### 7. *Parole Supervision*

Most formal sentencing structures provide for the community supervision of offenders released from prison. Even those states that have eliminated the parole board's power to release offenders from prison usually retain a period of supervision of the offender after the expiration of the prison term.<sup>117</sup> Is retention of parole supervision a predictive, or at least a non-desert, feature? That would depend on how onerous that supervision is. Kathleen Hanrahan and I have suggested elsewhere<sup>118</sup> that (1) there could not be parole supervision under a pure Desert Model;<sup>119</sup> (2) parole supervision with modest sanctions against parole violators would be permissible under a Modified Desert Model; and (3) parole supervision with very intrusive conditions, or with potentially se-

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<sup>114</sup> Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 805.

<sup>115</sup> The Illinois sentencing code provides a schedule of extended terms, ILL. REV. STAT. ch. 38, § 1005-8-2 (1981), and gives judges broad authority to invoke these terms, at their discretion, for second felony offenders. *Id.* ch. 38, § 1005-5-3.2b (1981). The statute does not spell out the purposes for which such longer terms may be imposed, permitting judges to use them when they find the individual a bad risk. For a summary of the main provisions of the Illinois law, see Bagley, *Why Illinois Adopted Determinate Sentencing*, 62 JUDICATURE 390 (1979).

<sup>116</sup> An example is Oregon's indeterminate sentence for dangerous offenders, which is applicable to persons convicted of certain serious crimes if the court makes a special finding, after psychiatric examination, that the defendant "is suffering from a severe personality disorder indicating a propensity toward criminal activity." OR. REV. STAT. § 161.725 (1981).

<sup>117</sup> For example, Minnesota has eliminated parole release for felons convicted under its determinate-sentence statute, but provides for parole supervision during the last one-third of the sentence. von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4, at 214 n.183. California likewise has eliminated parole release, but provides for parole supervision for specified periods up to three years. CAL. [PENAL] CODE § 3000(a) (West 1982).

<sup>118</sup> A. VON HIRSCH & K. HANRAHAN, *supra* note 17, at 59-72.

<sup>119</sup> *But see* R. SINGER, *supra* note 15, at 118-21.

vere revocation sanctions, could stand only on a utilitarian sentencing philosophy.

One thus should look at the potential burdensomeness of the conditions of supervision and at the severity or potential severity of the revocation sanctions for parole violators. The greater these are, the more the system is oriented away from desert.

## VI. DESERT, PREDICTION, AND CONTROL OF DISCRETION

To what extent are limitations on sentencing discretion called for by a desert rationale, or by a predictive one? Any theory-guided sentencing system needs dispositional standards in order to assure that individual decisionmakers will pursue that theory's goals, not others of their own choosing. Standards also assure that decisionmakers will pursue the prescribed goals in a reasonably consistent manner. The choice of a sentencing philosophy bears on a different question—not whether there should be standards, but what their content should be: what characteristics of the offense and the offender should determine the disposition, and how specific those standards should be.

### A. DESERT AND CONTROL OF DISCRETION

A desert rationale is not, *per se*, addressed to the control of discretion. The principle of commensurate-deserts is concerned with the relationship between the seriousness of crimes and the severity of punishments. Limiting discretion is germane to desert only as a means to the end of rendering punishments more commensurable.<sup>120</sup>

Standards are needed to implement a desert model in order to ensure that judgments of seriousness of crimes, and of deserved severity of punishment, are made consistently. Judges or other individual decisionmakers may disagree with one another about the seriousness of various kinds of criminal conduct. To assure that similar conduct is rated similarly in its seriousness, there should be standards establishing the relative gravity of crimes. Individual decisionmakers may disagree, likewise, on how the defendant's criminal history should be rated, and how much weight that history should be given; to assure consistent treatment in this area, standards for assessing that history are needed. Individual decisionmakers can differ, above all, in their views of what punishment levels are appropriate, given the seriousness of the criminal conduct. Therefore, there need to be standards that specify the quantum of punishment that is deemed deserved.

Desert theory does not, however, dictate just how detailed the rules

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<sup>120</sup> See von Hirsch, "Neoclassicism," *supra* note 7.

should be, or how much residual discretion those rules should permit. While the theory calls for equal treatment of "normal" cases of any given offense, it also requires differentiation to be made when there are special circumstances bearing on the harm or culpability of the conduct. The structure thus needs a normally-recommended disposition or range of dispositions for the normal cases, but flexibility to deviate from that disposition or range in unusual circumstances. When one tries to embody such a complex structure in rules, one encounters the familiar dilemma. The more detailed the rules and the less room for discretionary choices, the more cumbersome the system becomes, and the more it tends to detail inappropriately and unjustly with unforeseen contingencies. The less the detail and the more interstitial discretion, the greater is the risk of inconsistent treatment of similar cases. Some sensible compromise must be worked out.

The search for such a compromise is interestingly illustrated in Minnesota's guidelines. Minnesota's solution has been to adopt a firm dispositional line between imprisonment and lesser offenses, narrow ranges of duration where imprisonment is the recommended sentence, a fairly stringent standard for departing from these presumptive dispositions, but a rather wide leeway once departures have been justified.<sup>121</sup> Each of these decisions brings into sharp relief the major issues that one must address when attempting to write sentencing standards on desert-oriented principles.<sup>122</sup>

#### B. PREDICTIVE SENTENCING AND CONTROL OF DISCRETION

How much constraint on discretion is called for under a predictively-oriented rationale? The answer may be even more variable than it is with desert.

In discussing a theory of predictive restraint, one must distinguish between two questions. The first is the judgment of risk: what is the likelihood of new criminality, what kind of criminality is expected, and how long is the risk expected to endure? This is an empirical question—an inference from past behavior and known characteristics of persons to their future conduct. The second is the judgment of what disposition should be made once one has assessed the risk. This is a question of policy, not of fact. It involves the value judgment of whether the need to protect society from a given kind of predicted conduct is urgent enough to warrant the deprivation of the offender's liberty. It also involves resource-allocation issues of what priority should be given to the

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<sup>121</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4.

<sup>122</sup> The major issues before the Minnesota Commission are analyzed in *id.*

prevention of various risks in a system having limited correctional resources.

To answer the policy question, standards are needed in order to ensure that the issues concerning values and resources are answered in considered, consistent fashion. Without such standards, policy will be set through divergent individual decisions. Some individual decisionmakers may, for example, decide to confine only offenders thought likely to perpetrate violent crimes, whereas other officials, having different personal philosophies, may decide to employ their powers of predictive restraint to confine potential minor offenders as well.<sup>123</sup>

Answering the first, empirical question depends on the relative efficacy of statistical versus clinical prediction.<sup>124</sup> To the extent that statistical prediction is superior, the predictive factors can be specified in the guidelines and applied with little need for deviation in individual cases. If the offender's criminal history and other predictive factors indicate that he is in a high-risk category, he would simply receive the designated term of confinement. Judges might not need to be given much power to invoke special circumstances that suggest in qualitative fashion that the defendant is a better or worse risk; such clinical judgments of risk may not sufficiently enhance the accuracy of the statistical forecast. Special aggravating and mitigating circumstances bearing on offenders' culpability could largely be disregarded on grounds that one is focusing on risk, not blameworthiness. Thus, one could imagine such a predictively-oriented system having narrowly-prescribed presumptive sentences and little leeway for special circumstances. Such a system may seem mechanical, but this might possibly enhance, not diminish, its predictive usefulness.

Standards with wider leeway would be necessary under a predictively-oriented model only to the extent that "clinical" predictions enhanced predictive accuracy. If judges could, by making qualitative assessments of defendants, foretell future criminality better than prediction tables could, then and only then would there be a need to add substantial discretionary elements to the standards. The available evidence, however, generally does not appear to support this supposition.<sup>125</sup>

This suggests that the logic of prediction points exactly in the opposite direction from the traditional view of predictive restraint. The traditional view was that wide discretion should be granted in order to allow decisionmakers to fit the disposition to the risk posed by the de-

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<sup>123</sup> von Hirsch, *supra* note 81, at 725-26; see also, Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1970).

<sup>124</sup> P. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION (1954).

<sup>125</sup> Monahan, *supra* note 77, at 257-61.

fendant.<sup>126</sup> In fact, the contrary may be the case: predictive restraint might best be achieved by detailed, narrowly-drawn—indeed, rigid—standards.

But even if the *preferred* method of predictive restraint might involve detailed standards, it is not the only method. Both statistical and clinical predictions of recidivism tend to use similar information—largely, the defendant's criminal record and a few items about his social history. A more discretionary system—one that instructed judges to base sentences on expected future conduct, and left them leeway on how to forecast such conduct—might still have some success as a technique of predictive restraint.<sup>127</sup> The different judges in such a system might, concededly, exercise their discretion in such a fashion that defendants with similar criminal and social histories would receive different dispositions. But such disparity might be deemed more acceptable than it would under a desert model. Parity requirements are, as noted above, an essential part of treating offenders commensurately with their blameworthiness. If blame and blameworthiness are downplayed or disregarded, however, the only thing that remains is the efficacy of the system—plus some generalized principle of equal treatment which, unlike the parity requirement of desert, would permit inequalities to the extent they promote or support the utilitarian ends of the system.<sup>128</sup>

The foregoing indicates that one cannot infer the implicit rationale of a formal sentencing structure merely from the degree of specificity of its rules. Either a desert-oriented scheme, or a predictively-oriented one, can be written with more or less detail. What is critical for identifying the purposes of a system is rather the *type* of features of the crime and/or its perpetrator upon which the system relies.

## VII. CONCLUDING OBSERVATIONS

The frenzied pace of legislative activity on sentencing in the mid-seventies<sup>129</sup> has now (mercifully) slowed. A retreat to the wholesale sentencing discretion that existed a decade ago is, however, unlikely. Formal sentencing structures seem to be here to stay. There may be a change in rulemakers, as states become disenchanted with legislative standard-setting and come to prefer sentencing commissions or other

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<sup>126</sup> See D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 43-81 (1980).

<sup>127</sup> Even such an advocate of statistical prediction as Greenwood has suggested that judges, in making discretionary sentencing decisions, may have some success in predicting recidivism. Petersilia & Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 J. CRIM. L. & CRIMINOLOGY 604, 615 (1978).

<sup>128</sup> Morris, *supra* note 11, at 267.

<sup>129</sup> von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 1, at 315-16.



specialized rulemaking bodies.<sup>130</sup> Systems of sentencing rules written with some sophistication and concern for the availability of correctional resources are more likely to survive than are coarser efforts.<sup>131</sup> But in a significant number, if not necessarily the majority, of American jurisdictions, standards or guidelines for sentencing decisions will continue to develop, survive, and change.<sup>132</sup>

One can thus expect continued debate on what rationale those standards should embody. Several American jurisdictions, including Minnesota in its carefully crafted guidelines, have relied primarily on desert.<sup>133</sup> There has been newly revived interest in predictive sentencing.<sup>134</sup> But punishing offenders for expected future crimes raises disturbing ethical and evidentiary problems<sup>135</sup>—disturbing enough, I expect, to prevent a clear consensus from developing in favor of predictive sentencing. What one can more realistically anticipate is continued competition between desert and preventive conceptions of sentencing—with varying mixes of these two conceptions influencing sentencing policy in various jurisdictions. There will thus continue to be a need for evaluating sentencing standards in a manner responsive to the normative issues concerning commensurability and crime control.

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<sup>130</sup> *Id.* at 299-309.

<sup>131</sup> *Id.* at 296-98.

<sup>132</sup> An indication of this continuing activity is the creation in 1981 of a sentencing commission for the state of Washington. WASH. REV. CODE ANN. § 9.94A.040 (Supp. 1982). The commission had been drafting its sentencing guidelines while this article was being written.

<sup>133</sup> von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 4. The guidelines recommended by Washington's sentencing commission are likely also to emphasize desert.

<sup>134</sup> See, e.g., P. GREENWOOD, *supra* note 77.

<sup>135</sup> For a sketch of the evidentiary problems, see *supra* note 80 and text accompanying notes 79-81. For a discussion of the ethical problems of predictive sentencing, see von Hirsch, *Utilitarian Sentencing*, *supra* note 13.